No. 86-1002

In the Supreme Court of the United States

OCTOBER TERM, 1986

DONALD NEWELL, ET AL., PETITIONERS

v.

THE MARITIME ADMINISTRATION AND UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE MARITIME ADMINISTRATION AND THE UNITED STATES

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Petitioners, a member of the United States Naval Reserve and his wife, seek damages from the United States under the Suits in Admiralty Act (46 U.S.C. 741 *et seq.*) and the Public Vessels Act (46 U.S.C. 781 *et seq.*) for injuries incurred while on reserve training duty. Petitioners contend that, despite this Court's holding in *Feres* v. *United States*, 340 U.S. 135 (1950), service members injured incident to military service may pursue tort claims against the Federal Government where the complaint alleges the negligence of civilian employees of the Federal Government. Petitioners also contend that the rule that service members injured incident to service may not pursue tort actions against the Federal Government does not apply in admiralty cases.

1. Petitioner Donald Newell was a member of the United States Naval Reserve. In May 1983 petitioner was ordered to Naval Reserve training duty aboard the *S/S Scan*, a ship

berthed in the Philadelphia Navy Yard. See Pet. 5. The *S/S Scan* is part of our nation's Ready Reserve Force, a fleet of ships acquired and maintained through the joint effort of the Department of the Navy and the Maritime Administration, a federal agency within the United States Department of Transportation. See 50 U.S.C. App. 1744; 46 U.S.C. 1601; C.A. App. 17a-18a.[1] The Ready Reserve Force is an element of the National Defense Reserve Fleet and is maintained in a state of readiness to meet the shipping needs of the armed services in the event of a defense emergency. See C.A. App. 17a. Pursuant to an agreement between the Navy and the Maritime Administration, the Navy was given permission by the Maritime Administration to use the *S/S Scan* as a training facility for Naval Reserve Cargo Handling Battalions. *Id.* at 24a, 29a. On May 14, 1983, as part of a training exercise on the *S/S Scan,* petitioner, along with other Naval reservists, was loading cargo from the ship to the dock, when the cargo lift fell and struck him. See C.A. App. 3a. He was treated at the Navy Regional Medical Center in Philadelphia. See Pet. App. 4a.

2. Petitioner applied for and received the full range of disability benefits made available to injured Naval reservists. See Pet. App. 4a; 10 U.S.C. 6148. In addition, petitioner brought this action under the Suits in Admiralty Act and the Public Vessels Act. Petitioner alleged that the cargo winches aboard the *S/S Scan* were defective and that the Maritime Administration was negligent in not repairing the winches or warning the Navy of the alleged defects. See C.A. App. 3a-4a; Pet. 12.

The government moved for summary judgment, contending that petitioner's claim was barred because his injuries were suffered incident to his military service. Petitioner

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[1]Citations to "C.A. App." are to the joint appendix filed in the court of appeals.

stipulated that he was injured while on training duty aboard the *S/S Scan* as a member of the United States Naval Reserve, that the *S/S Scan* was in the Ready Reserve Force of the National Defense Reserve Fleet, and that at the time of the injury the *S/S Scan* was being used by the Navy as a training facility pursuant to a memorandum of understanding between the Navy and the Maritime Administration. See Pet. App. 13a; C.A. App. 10a-11a.

The government's exhibits supporting its motion for summary judgment described the joint Navy/Maritime Administration responsibility for acquisition and maintenance of the *S/S Scan* for the Ready Reserve Force. According to a memorandum of understanding between the Navy and the Maritime Administration, the approval of the Navy is required for acquisition of any ship for the Ready Reserve Force. See C.A. App. 18a. Once acquired, ships are "maintained in accordance with standards agreed to by [the] Navy and [the Maritime Administration]" and are prepared for the Ready Reserve Force "in accordance with specifications mutually agreed to by [the] Navy and [the Maritime Administration]" (*ibid.*). The Navy and Maritime Administration are responsible for joint annual maintenance and repair reviews of Ready Reserve Force ships and for deciding on the nature and level of repairs (*id.* at 20a). Another memorandum of understanding between the Navy and the Maritime Administration specifically described the Navy's use of the *S/S Scan* for military exercises (*id.* at 27a-32a). The agreement gives the Navy the right to use the *S/S Scan* for training exercises and specifically charged the Navy with maintenance responsibility for the "cargo booms, cargo gear, and winches" (*id.* at 29a).

The district court granted the government's motion for summary judgment (Pet. App. 1a-10a). The court noted that "[petitioner] has admitted that his injury occurred in the course of activity incident to service" (*id.* at 7a-8a). In

response to petitioner's contention that his suit was not barred since he alleged negligence on the part of *civilian* employees of the Federal Government, the court noted that in *Jaffee* v. *United States*, 663 F.2d 1226, 1238 (1981) (en banc), cert. denied, 456 U.S. 972 (1982), the Third Circuit "ruled that the principles * * * in *Feres* apply equally to civilian defendants" involved in activities incident to military service. Pet. App. 7a.

The court also rejected petitioner's contention that his case was distinguishable from *Jaffee* because he brought suit under the Public Vessels Act and the Suits in Admiralty Act rather than the Federal Tort Claims Act (FTCA). The court noted (Pet. App. 6a) that this argument has been uniformly rejected by the courts of appeals. In addition, the court concluded that the policies supporting the conclusion that Congress did not intend to permit service members injured incident to military service to bring suit under the FTCA also apply to suits brought by service members under the Public Vessels Act and the Suits in Admiralty Act. Pet. App. 7a.

3. The court of appeals affirmed (Pet. App. 11a-25a). The court began by noting that in *Feres* "the court held that 'the Government is not liable * * * for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service' " (Pet. App. 12a (quoting *Feres*, 340 U.S. at 146)). The court went on to note that in *Jaffee* it "held that the *Feres* doctrine applies to claims based on the actions of civilian employees of the federal government involved in the activities incident to military service" (Pet. App. 12a). The court found *Jaffee* controlling (*id.* at 16a). The court stated that "[petitioner] concededly was injured in the course of activity incident to * * * service" (*ibid.*), and refused to allow petitioner to "circumvent *Feres* by pleading the negligence of the Maritime Administration—a civilian

agency of the federal government involved in military activities in acquiring, outfitting, and maintaining, in conjunction with the Navy, ships for the Ready Reserve Force" (*id.* at 16a-17a).

The court reasoned that this result "was based on the very nature of military activities" (Pet App. 19a). The court stated (*id.* at 19a-20a (citations omitted)):

> as this case shows, when military actions are taken or military operations carried out, the United States government acts as an entity, often relying upon and drawing from its civilian agencies for personnel, equipment, technological assistance, or intelligence reports. As [petitioner] has acknowledged, the Maritime Administration maintains the S/S Scan "for reasons of * * * national defense." * * * And in carrying out this national defense activity, it is clear that the Maritime Administration, in conjunction with the Navy, is called upon to play crucial military functions. * * * Thus, this case, and all of the cases cited, are testament to the wide range of military activities that necessarily require civilian participation * * *.

The court therefore concluded that "the rule in *Feres* cannot be artificially limited to cover only military personnel, but * * * must also include those civilians who are necessarily involved in activities incident to military service" (*id.* at 20a-21a (emphasis added)).

4. In *Feres* the Court held that "the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to [military] service" (340 U.S. at 146). See *United States* v. *Shearer*, No. 84-194 (June 27, 1985), slip op. 4-5. Petitioner concedes that his injuries arose out of activity incident to military service. See Pet. App. 14a; C.A. App. 45a. Petitioner argues, however, that

Feres is inapplicable to his case for two reasons. First, he has alleged the negligence of civilian rather than military employees of the Federal Government. Second, petitioner asserts that, unlike the FTCA involved in *Feres*, the Suits in Admiralty Act and the Public Vessels Act allow actions by military personnel for injuries incurred incident to service.

a. As to the first argument, as petitioner notes (Pet. 14), this Court granted certiorari in *United States* v. *Johnson*, No. 85-2039 (Oct. 6, 1986), to decide whether a serviceman injured incident to military service may bring suit under the FTCA where the complaint alleges the negligence of civilian employees of the Federal Government only. The petition in this case should be held and disposed of as is appropriate in light of the decision in *Johnson*.[2]

b. The petition in *United States* v. *Johnson*, No. 85-2039, does not raise the other issue raised by petitioner (Pet. i, 32-40), whether service members injured incident to military service may bring suit against the government under the Suits in Admiralty Act and Public Vessels Act even though they may not bring suit under the FTCA. However, there is no reason for this Court to grant plenary review on that issue because the ruling below is required by the reasoning in *Feres* and is consistent with the decisions of all of the other courts of appeals that have addressed the issue.

At the time of the *Feres* decision, both the Public Vessels Act and the Suits in Admiralty Act had been the law for well over 20 years. The Court nonetheless said that it knew "of no American law which ever has permitted a soldier to recover for negligence, against either his superior officers or the Government he is serving." 340 U.S. at 141 (footnote omitted).

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[2]Petitioner also relies (Pet. 14, 26) on *Stanley* v. *United States*, 786 F.2d 1490 (11th Cir. 1986), to support his claim that the *Feres* doctrine does not apply. The Court also granted certiorari in *Stanley*, No. 86-393 (Dec. 9, 1986).

As petitioner acknowledges (Pet. 32-33), every court of appeals that has considered the question has held that service members injured incident to military service may not bring suit against the Federal Government under either the Suits in Admiralty Act or the Public Vessels Act. See *Potts* v. *United States*, 723 F.2d 20, 21-22 (6th Cir. 1983), cert. denied, 466 U.S. 959 (1984); *Hillier* v. *Southern Towing Co.*, 714 F.2d 714, 721 (7th Cir. 1983); *Cusanelli* v. *Klaver*, 698 F.2d 82, 85 (2d Cir. 1983); *Charland* v. *United States*, 615 F.2d 508, 509 (9th Cir. 1980); *Beaucoudray* v. *United States*, 490 F.2d 86 (5th Cir. 1974).

Further, any departure from this settled state of the law would directly contravene the policies underlying this Court's decision in *Feres* that Congress did not intend to waive the government's immunity to suit in cases involving service members injured incident to service. The Court has recently stressed that the bar to claims arising incident to service is "best explained by the 'peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty.' " *Shearer*, slip op. 5, quoting *United States* v. *Muniz*, 374 U.S. 150, 162 (1963).

This concern is equally applicable to claims brought in admiralty. "The peculiar and special relationship of the soldier to his superiors" (*United States* v. *Brown*, 348 U.S. 110, 112 (1954)) and the "hierarchical structure of discipline and obedience to command" (*Chappell* v. *Wallace*, 462 U.S. 296, 300 (1983)) exist at sea, no less than on land. Thus, in actions brought by service members under the Public Vessels Act or the Suits in Admiralty Act, "the effect of the action upon military discipline is identical" (*Stencel Aero Engineering Corp.* v. *United States*, 431 U.S. 666, 673

(1977)) to suits brought by service members under the FTCA. In an admiralty action—no less than an FTCA claim—" [t]he trial would * * * involve second-guessing military orders, and would often require members of the Armed Services to testify in court as to each other's decisions and actions" (*ibid.*). The bar to suit recognized in *Feres* is based on the concern that "second-guessing [of] military orders" in civil tort actions would cause service members to hesitate before taking action, thus undermining the military's mission of "provid[ing] an effective defense on a moment's notice" (*Goldman* v. *Weinberger*, No. 84-1097 (Mar. 25, 1986), slip op. 5). Given the wide range of important and sensitive military activities that occur at sea, it is as important at sea as on land that "the habit of immediate compliance with military procedures and orders must be virtually reflex with no time for debate or reflection" (*Chappell*, 462 U.S. at 300). Accordingly, there is no reason to believe that Congress intended to waive sovereign immunity to tort suits brought by service members injured incident to military service on land but, in statutes passed years earlier, intended to waive sovereign immunity to tort suits brought by service members injured incident to military service at sea.[3] Such an interpretation would result in a crazy-guilt pattern of tort liability completely lacking in rationality.

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[3]Like service members injured incident to service on land, service members injured incident to service at sea are covered by "systems of simple, certain, and uniform compensation" (*Feres*, 340 U.S. at 144) under the Veterans' Benefits Act. Congress intended for this "comprehensive" scheme (*ibid.*) to be the "sole remedy" (*Hatzlachh Supply Co.* v. *United States*, 444 U.S. 460, 464 (1980)) for injuries incurred incident to service on land. It is equally clear that the Veterans' Benefits Act is "a substitute for tort liability" (*Stencel Aero Engineering Corp.*, 431 U.S. at 671) for injuries at sea.

Petitioner argues (Pet. 36-37) that the legislative histories of the Public Vessels Act and the Suits in Admiralty Act contain no discussion of an express exception for injuries incurred incident to service. But neither the text nor the legislative history of the FTCA contains any such discussion, a fact specifically noted by the Court in *Feres* and found not dispositive. See *Feres*, 340 U.S. at 138-139; *Hillier*, 714 F.2d at 721.[4] Petitioner's claim that service members injured incident to service may pursue admiralty actions against the government, even though it is clear that they may not sue under the FTCA, should therefore be rejected.

It is therefore respectfully submitted that the petition for a writ of certiorari should be held and disposed of as is appropriate in light of the decision in *United States* v. *Johnson*, No. 85-2039.

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[4]Petitioner also argues (Pet. 37) that since the discretionary function exception contained in the FTCA (28 U.S.C. 2680(a)) is not applicable to admiralty actions, the FTCA's *Feres* doctrine is also inapplicable in admiralty actions. The premise of petitioner's argument is flawed. Courts have generally construed the Public Vessels Act and the Suits in Admiralty Act to contain a discretionary function exception. See *Wiggins* v. *United States*, 799 F.2d 962, 964-965 (5th Cir. 1986); *Drake Towing Co.* v. *Meisner Marine Const. Co.*, 765 F.2d 1060, 1064 (11th Cir. 1985); *Canadian Transport Co.* v. *United States*, 663 F.2d 1081, 1086 (D.C. Cir. 1980); *Magno* v. *Corros*, 630 F.2d 224, 229 (4th Cir. 1980), cert. denied, 451 U.S. 970 (1981); *Bearce* v. *United States*, 614 F.2d 556, 559 (7th Cir.), cert. denied, 449 U.S. 837 (1980); *Gercey* v. *United States*, 540 F.2d 536, 539 (lst Cir. 1976), cert. denied, 430 U.S. 954 (1977). *Lane* v. *United States*, 529 F.2d 175 (4th Cir. 1975), cited by petitioner as stating to the contrary (Pet. 40 n.8), was substantially rejected by that court's later decision in *Faust* v. *South Carolina State Highway Dep't*, 721 F.2d 934, 939 (4th Cir. 1983), cert. denied, 467 U.S. 1226 (1984). Also, the contrary dictum in *De Bardeleben Marine Corp.* v. *United States*, 451 F.2d 140, 145-146 & n.15 (5th Cir. 1971), was explicitly rejected by the Fifth Circuit in *Wiggins*, 799 F.2d at 965.